

**Plumbers Union, Local No. 2, a/w United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO (Morse Diesel International and Hydraulic Plumbing and Heating Corp.) and Contractors' Association of Greater New York, Inc. and Mason Tenders District Council of Greater New York of the Laborers International Union of North America, AFL-CIO.** Case 2-CD-825

May 22, 1992

# DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT  
AND RAUDABAUGH

The charge in this Section 10(k) proceeding was filed November 26, 1991, by the Contractors' Association of Greater New York, Inc., alleging that the Respondent, Plumbers Local No. 2, violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing Morse Diesel International (Morse Diesel) to assign certain work to employees it represents rather than to employees represented by Mason Tenders District Council of Greater New York (Mason Tenders). The hearing was held January 14, 1992, before Hearing Officer Terry Morgan.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

## I. JURISDICTION

Morse Diesel, a New York corporation, is engaged in the business of general contracting and construction management at its facility in New York, New York, where it annually receives gross revenues in excess of \$1 million, and purchases and receives goods, products, and supplies in excess of \$50,000 from points directly outside the State of New York. Morse Diesel is an employer-member of the Contractors' Association of Greater New York, Inc. (CAGNY), a multiemployer association which represents its employer-members in negotiating and administering collective-bargaining agreements with various labor organizations, including Mason Tenders.

Hydraulic Plumbing and Heating Corp. (Hydraulic), a New York corporation with an office and place of business at 222-15 Northern Boulevard, Bayside, New York, is engaged in the business of plumbing contracting. Annually, in the course and conduct of its business, Hydraulic receives gross revenues in excess of \$1 million and purchases and receives goods, mate-

rials, and supplies valued in excess of \$50,000 from points located directly outside the State of New York.

The parties stipulate, and we find, that Morse Diesel and Hydraulic are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Plumbers Local No. 2 and Mason Tenders are labor organizations within the meaning of Section 2(5) of the Act.

## II. THE DISPUTE

### A. Background and Facts of Dispute

Morse Diesel is the general contractor and construction manager at a construction site located at 44 West Fourth Street. Morse Diesel subcontracted all the plumbing work at the site to Hydraulic. By change order dated October 22, 1991,<sup>1</sup> Morse Diesel amended its contract with Hydraulic to include a provision requiring Hydraulic to provide a temporary natural gas heating system to facilitate construction at the site through the upcoming winter. To that end, Hydraulic ordered over 130 natural gas salamanders<sup>2</sup> for delivery at the site.

Morse Diesel is a party to a collective-bargaining agreement with Mason Tenders. Hydraulic is a party to a collective-bargaining agreement with Plumbers Local No. 2.

On November 22, Mel Goldsmith, business agent for Plumbers Local No. 2, contacted Morse Diesel's general superintendent and senior vice president, Philip Undank, and claimed the work of unloading the natural gas salamanders on behalf of the plumbers employed by Hydraulic. Undank told Goldsmith that the work was within the jurisdiction of the Mason Tenders employed by Morse Diesel by virtue of the Mason Tenders/Morse Diesel collective-bargaining agreement. According to Undank, Goldsmith told him that if the work was not assigned to employees represented by Plumbers Local No. 2, they would refuse to connect the units to the natural gas source. As a result of this conversation, Undank ordered Hydraulic to postpone delivery of the salamanders from November 25 to December 4.

When the salamanders arrived at the jobsite on December 4, Hydraulic's foreman, Kevin Brady, a member of Plumbers Local No. 2, went to Morse Diesel's job superintendent, Stephen Jeffrey, and informed Jeffrey that the shipment had arrived and that the plumbers would unload the salamanders and move them into the construction area. Jeffrey did not respond to Brady. However, when Brady left Jeffrey summoned the Mason Tenders foreman and told him the heaters had arrived and to get ready to unload them.

<sup>1</sup> All dates are 1991 unless otherwise indicated.

<sup>2</sup> A natural gas salamander is a temporary heating unit that uses natural gas as its fuel source.

At the loading dock, Jeffrey and the Mason Tenders were met by Brady and the Plumbers Local No. 2 shop steward, Phil Rozansky, who insisted that employees represented by the Plumbers and not the Mason Tenders would unload the salamanders. When Jeffrey said he would not allow the plumbers to use the hoists to carry the units to the floors, Brady replied that the plumbers would carry the heaters up the stairs, if necessary. Jeffrey ordered the mason tenders to begin unloading the salamanders but Brady and Rozansky stood between the mason tenders and the units. Jeffrey then refused delivery of the salamanders and sent the truck away.<sup>3</sup>

### B. Work in Dispute

The disputed work involves the unloading and general placement<sup>4</sup> of portable natural gas heaters known as salamanders at the jobsite located at 44 West Fourth Street, New York, New York.

### C. Contentions of the Parties

Plumbers Local No. 2 argues that its collective-bargaining agreement with Hydraulic requires that employees it represent be awarded the work of unloading and placing the natural gas salamanders. Plumbers Local No. 2 also argues that it is standard practice in the industry for plumbers to unload and place natural gas salamanders, that this practice is necessary because of the safety risk of mishandled heaters, and that the plumbers have the extensive training necessary to prevent costly accidents.

Morse Diesel and Mason Tenders argue that employees represented by the Mason Tenders have the exclusive right to perform the work at issue by virtue of the collective-bargaining agreement between them, that the work of unloading and placing salamanders is unskilled work, and that it is standard practice in the industry for mason tenders or laborers to perform this work. Morse Diesel and Mason Tenders also argue that the preference and past practice of Morse Diesel, rather than that of Hydraulic, should be given weight because Morse Diesel controls the assignment of the work in dispute.

### D. Applicability of the Statute

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it

<sup>3</sup>Pursuant to an injunction under Sec. 10(l) of the Act, issued on December 10 by the United States District Court for the Southern District of New York, the mason tenders unloaded the salamanders pending resolution of this dispute.

<sup>4</sup>Although the notice of hearing describes the disputed work as the “unloading of heaters known as salamanders,” it is clear from the record that the term “unloading” includes carrying the heaters to the general vicinity where they eventually will be used. Thus we find that the work in dispute involves the unloading and general placement of the heaters.

must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed on a method for voluntary adjustment of the dispute.

As noted above, Undank testified that, on November 22, Goldsmith told him that if plumbers were not assigned the work of unloading the salamanders, they would refuse to connect the heaters to the gas, a task which concededly belonged to them. Thereafter, on December 4, employees represented by Plumbers Local No. 2 stood between the mason tenders and the salamanders, physically preventing the mason tenders from unloading the heaters. We find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that the dispute is properly before the Board for determination.

### E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

As a threshold issue, we note that the parties disagree as to whether the Board should give weight to the preference and past practice of Hydraulic or to that of Morse Diesel. We note initially that in cases involving similar circumstances, the Board has considered the subcontractor’s and not the general contractor’s preference and past practice where the former controls the assignment of the disputed work.<sup>5</sup> In this regard, we reject the Mason Tenders’ and Morse Diesel’s contention that Morse Diesel, rather than Hydraulic, controls the assignment of the disputed work. The October 22 change order subcontracted to Hydraulic the work of “furnishing all labor material, tools and supervision required to provide a temporary gas heating system for the project,” including “all equipment rental, delivery, handling and removal costs.” Additionally, Hydraulic’s project manager, Miller, testified that he included labor costs for the disputed work as part of his bid. Moreover, whereas certain costs were specifically excluded from the change order, the costs for the disputed work were not mentioned.

Despite this specific language, Morse Diesel nevertheless argues that the disputed work was not encom-

<sup>5</sup>*Plumbers Local 525 (P & P Plumbing)*, 266 NLRB 515, 517 (1983); see also *Plumbers District Council 16 (L & M Plumbing)*, 301 NLRB 1203, 1205 (1991); *Laborers Local 646 (General Refrigeration)*, 268 NLRB 472, 473 (1983).

passed within the work it subcontracted to Hydraulic. Morse Diesel's chief mechanical/electrical estimator, Joseph Berrios, testified that, at a meeting on August 21, he instructed Miller that the work of unloading and placing the natural gas salamanders was within the jurisdiction of the Mason Tenders and not to include in his bid the costs of that work. Miller contradicted Berrios, testifying that the costs for the disputed work were included in his bid. Berrios' testimony was not corroborated by any other witnesses, although other agents of Morse Diesel also attended the August 21 meeting. Thus we find that the October 22 change order is the best evidence that Morse Diesel subcontracted to Hydraulic total responsibility for providing the temporary gas heating system, including the disputed work, and that parole evidence in the form of Berrios' testimony which contradicts the written contract is not persuasive. Accordingly, we conclude that, under the circumstances of this case, it is the preference and past practice of Hydraulic, rather than that of Morse Diesel, which should be considered as a factor in determining the dispute.

The following factors are relevant in making the determination of the dispute.

#### 1. Collective-bargaining agreements

Hydraulic has had successive collective-bargaining agreements with Plumbers Local No. 2. The 3-year contract that expired June 25, 1991, has been replaced with a subsequent agreement; both provide that the "installation, maintenance, servicing, handling, and dismantling of all piping and equipment" for a temporary heating system shall be performed by employees represented by Plumbers Local No. 2. That provision is broad enough to encompass the disputed work. Hydraulic is not a party to a collective-bargaining agreement with Mason Tenders. We therefore find that the factor of collective-bargaining agreements favors an award of the work in dispute to employees represented by Plumbers Local No. 2.

#### 2. Employer preference and past practice

Hydraulic's project manager, Miller, testified that, based on his experience, the disputed work always has been assigned to its Plumber-represented employees and that it is Hydraulic's preference to assign this work to these employees. Accordingly, we find that Hydraulic's preference and past practice favor awarding the work in dispute to employees represented by Plumbers Local No. 2.

#### 3. Area practice

Morse Diesel's job superintendent, Jeffrey testified that, on another job approximately 2 to 3 years earlier, mason tenders and not plumbers unloaded and placed natural gas salamanders at the site. On the other hand,

witnesses for Plumbers Local No. 2 testified that employees it represents always perform the disputed work. Accordingly, we find that this factor does not favor an award to employees represented by either Union.

#### 4. Relative skills

Witnesses for Plumbers Local No. 2 testified without contradiction that natural gas salamanders must be inspected carefully for defects or damage before being connected to the natural gas source. There is no dispute that mason tenders are not qualified to make this inspection. On the other hand, it is undisputed that no special skills are required to unload and generally place the heaters and that the required inspection need not be performed when the salamanders are unloaded from the truck. It is therefore immaterial that the mason tenders are not qualified to inspect the heaters. Accordingly, we find that this factor does not favor an award to employees represented by either Union.

#### 5. Economy and efficiency of operations

Notwithstanding our above finding, that no special skills are required to unload and generally place the natural gas salamanders, Miller testified without contradiction that it is more economical and efficient for the plumbers to inspect the heaters as they are unloaded in order to avoid hauling defective units to the floor and back to the truck. Accordingly, this factor favors an award of the disputed work to employees represented by Plumbers Local No. 2.

#### Conclusions

After considering all the relevant factors, we conclude that employees represented by Plumbers Local No. 2 are entitled to perform the work in the dispute. We reach this conclusion relying on the factors of collective-bargaining agreements, employer preference and past practice, and economy and efficiency of operations. In making this determination, we are awarding the work to employees represented by Plumbers Local No. 2, not to that Union or its members. The determination is limited to the controversy that gave rise to this proceeding.

#### DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees of Hydraulic Plumbing and Heating Corp. represented by Plumbers Union, Local No. 2, a/w United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO are entitled to perform the work of unloading and placing natural gas salamanders at the construction site located at 44 West Fourth Street, New York, New York.